BEFORE THE NATIONAL LABOR RELATIONS BOARD

RAYMOURS FURNITURE COMPANY, INC. and OUTTEN & GOLDEN LLP	Case No. 02-CA-136163

MOTION TO DISQUALIFY NATIONAL LABOR RELATIONS BOARD MEMBER WILLIAM EMANUEL FROM CASES APPLYING *D.R. HORTON*, 12-CA-25764

Pursuant to 5 C.F.R. §2635 and Executive Order 13770, Outten & Golden LLP, on behalf of individual Charging Parties Connie Patterson and David Ambrose, hereby moves the National Labor Relations Board and its newly confirmed member, William Emanuel, for an order disqualifying and/or recusing Member Emanuel from participating in any current or future case applying *D.R. Horton*, 357 NLRB 2277 (2012), and from participating in any deliberations concerning the Board's position or strategy in any such case, including but not limited to any of the five *D.R. Horton* cases pending in the United States Supreme Court: *NLRB v. Murphy Oil USA, Inc.*, 137 S. Ct. 809 (2017), *Epic Systems Corp. v. Lewis*, 137 S. Ct. 809 (2017), *Ernst & Young LLP v. Morris*, 137 S. Ct. 809 (2017) (consolidated for oral argument on October 2, 2017), *NLRB v. 24 Hour Fitness USA, Inc.*, 20-CA-035419, and *Patterson v. Raymours Furniture Co.*, 02-CA-136163 (held for the three consolidated cases).

In support of this motion, petitioner submits that recusal or disqualification is required because:

1. Member Emanuel served as counsel for a party employer while in private practice in several *D.R. Horton* cases between 2012 and the present, including several such cases that are still pending before the Board, including *Mastec, Inc.*, No. 12-CA-153478;

Quality Dining, No. 04-CA-175450; and *Handy Technologies, Inc*., No. 01-CA-158125 and 158144.

2. Littler Mendelson PC, the law firm in which Member Emanuel was an equity partner prior to his confirmation, is counsel for a party employer in numerous *D.R. Horton* cases that are still pending, including *Patterson v. Raymours Furniture*, 659 Fed. Appx. 40 (2d Cir. 2016), which is currently pending before the Supreme Court on a petition for writ of certiorari that was filed when Member Emanuel was still a partner at the Littler firm, *Cornerstone Health Care Group*, No. 16-CA-154503, *Walnut Creek Associates 2*, No. 32-CA-176353, *Mastec, Inc.*, No. 12-CA-153478, *Quality Dining*, No. 04-CA-175450, and others, and the Littler firm continues to be counsel for amicus DRI in support of the employers' position in the three consolidated *D.R. Horton* cases pending before the Supreme Court; and
3. The outcome of the pending *D.R. Horton* cases in the Supreme Court, which raise questions of law, not fact, will have a direct, controlling effect on the outcome of each of the cases in which Member Emanuel or his former colleagues at Littler Mendelson were or are counsel. Similarly, the outcome of any case in which the Board is asked to overturn its decision in *D.R. Horton* will have a direct, controlling effect on those cases.

Members of the National Labor Relations Board are executive branch employees bound by two sets of ethical standards: the Standards of Ethical Conduct for Employees of the Executive Branch established in Title 5 of the Code of Federal Regulations, and the Ethics Commitments by Executive Branch Appointees set forth by Executive Order 13770. Executive branch employees are also regulated by certain restrictions found in 18 U.S.C. §208.

The Code of Federal Regulations ("Code") prohibits government employees from acting partially towards a private organization or individual, 5 C.F.R. §2635.101(b)(8), and requires government employees to "endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards set forth in this part." *Id.* §2635.101(b)(14). An employee "should not participate" in any matter where the employee was employed by one of the parties within the last year, or where "the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter," unless a designated agency official is informed of the appearance problem and gives his or her authorization. *Id.* §2645.502.

Executive Order 13770 ("Executive Order") prohibits executive branch employees, for a period of two years from the date of appointment, from "participat[ing] in any particular matter involving specific parties that is directly and substantially related to [her or his] former employer or former clients. . . ." Ex. Order 13770, 82 Fed. Reg. 9333 (Jan. 28, 2017). A matter is "[d]irectly and substantially related" if "the appointee's former employer or a former client is a party or represents a party." *Id.* "Former employees" includes persons whom the "appointee served personally as agent, attorney, or consultant within the 2 years prior to the date of his or her appointment," and "former employer" is any person "for whom the appointee has within the 2 years prior to the date of his or her appointment served as an employee, officer, director, trustee, or general partner." *Id.* The Code imposes the same restriction for a one-year period.

Under 18 U.S.C. §208, every officer and employee of the executive branch and any independent agency of the United States is forbidden from participating "in a judicial or other proceeding, application, request for a ruling or other determination, [when] … to his knowledge, he … has a financial interest" in the matter, unless the officer or employee has advised the

government official responsible for his or her appointment of "the nature and circumstances of the judicial or other proceeding, application, request for a ruling or other determination[,] … makes full disclosure of the financial interest and receives in advance a written determination made by such official that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from such officer or employee." 18 U.S.C. §208. To constitute a violation, the matter must have a "direct and predictable effect" on the financial interest at issue, meaning there must be a "close causal link between any decision or action to be taken in the matter and any expected effect of the matter on the financial interest," in order for it to violate the law. 5 C.F.R. §2635.402.

The Code also requires recusal when a reasonable person would question the impartiality of the Member. Thus, 5 U.S.C. §2635.101(b)(14) provides that members "shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards set forth in this part. Whether particular circumstances create an appearance that the law or these standards have been violated shall be determined from the perspective of a reasonable person with knowledge of the relevant facts."

ARGUMENT

I. Member Emanuel May Not Participate in Any Case in Which He or Littler Mendelson Served as Counsel within the Past Two Years.

The Code and the Executive Order require Member Emanuel to recuse himself from all cases in which he or Littler Mendelson served as counsel within the past two years. Each of those cases is "a particular matter involving specific parties" and each is "directly and substantially related to [his] former employer or former clients." Exec. Order No. 13770, 82 Fed. Regt. 9333 (Jan. 28, 2017). "Directly and substantially related" is defined to include situations where the Member's former client is a party or where the Member's "former

employer" represents a party. "[F]ormer employer" is defined to include an entity in which the Member "served as" a "general partner."

II. Member Emanuel May Not Participate in Any Case That Will Have a Direct, Controlling Impact on a Case from Which He Must be Recused.

In every case arising under the Board's decision in *D.R. Horton*, the Board is being asked to overturn that decision. A decision by the Board to overturn *D.R. Horton* will have a direct and controlling effect on every case from which Member Emanuel is recused from participating, as explained in §I above. The impact from such a decision on his former clients and former law firm will be no different than if he directly participated in the cases in which those clients are parties or his former firm represents a party and sought to have *D.R. Horton* overturned. The Executive Order and Code thus require that Member Emanuel be recused from all pending *D.R. Horton* cases.

The Board's internal operating procedures generally permit a Member to participate in any pending case, even if he or she is not initially assigned to the three-member panel considering the case. *See* Fredric H. Fischer, Brent Garren, John C. Truesdale, *How to Take a Case Before the NLRB* at 40 (8th ed. 2008). Unless Member Emanuel is recused from all pending cases raising *D.R. Horton* issues, Member Emanuel could choose to participate in a pending *D.R. Horton* case in which he did not previously represent a party, and in which Littler Mendelson did not previously and does not currently represent a party, thereby effectively deciding the *D.R. Horton* issues in all pending cases that *do* involve his former clients and law firm.

The rules of ethics do not permit such obvious evasion. Federal courts have so ruled in cases involving similar fact patterns under the judicial recusal statute.[1] Numerous cases establish the commonsense principle that when an ethical standard (whatever its substantive content) requires recusal in Case X, that same ethical standard necessarily also requires recusal in any case that would directly control the result in Case X. For example, in *In re Aetna Cas. & Sur. Co.*, 919 F.2d 1136 (6th Cir. 1990), seven separate cases were filed by FDIC against Aetna, then consolidated and assigned to Judge Hull. *Id*. at 1138. Aetna sought a writ of mandamus ordering Judge Hull to recuse himself from those cases, because the judge's daughter had been counsel in four of them. Judge Hull initially recused himself from all seven cases, which were reassigned to another judge, but Judge Hull later reassigned back to himself the three cases in which his daughter had not been counsel. The Sixth Circuit held that recusal from those three cases was also required, because of their potentially controlling effect on the other four cases:

> . . . . A decision on the merits of any important issue in any of the seven cases, moreover, could or might constitute the law of the case in all of them, or involve collateral estoppel, or might be highly persuasive as a precedent. Thus, even if the [daughter's] firm were not counsel of record for FDIC in all of the seven cases but only some of them, and was not of counsel in the three cases reassigned by Judge Hull to himself, we would find that the circumstances would indicate to a reasonable party, such as Aetna, that his partiality might be implicated, and/or that §455 would apply.

Id. at 1143. The Sixth Circuit based its order on a finding that the seven cases involved "substantially similar issues and similar controlling questions of law." *Id*.

[1] While the statutory standard governing judicial recusal set forth in 29 U.S.C. §455 does not by its terms apply to Board Members, because the standards governing Board members and the standards governing judges are so similar, several Board Members have applied the judicial standard as construed by the courts to their own conduct, while others have found that "the standards set forth [in §455] as well as their construction by the court offer useful guidance in the application" of the executive orders and code provisions governing Board Members. *See Detroit Newspapers*, 326 NLRB 700, 710-13 (1998) (separate opinion by Chairman Gould); *Pomona Valley Hospital Medical Center*, 355 NLRB 234, 239 (2010) (Member Becker ruling on motions).

Here, Member Emanuel must be recused from participating in any case raising the *D.R. Horton* issues because any such case will necessarily involve "similar controlling questions of law" as in the *D.R. Horton* cases from which he is directly recused as explained in § I.

Similarly, in *Shell Oil Co. v. United States*, 672 F.3d 1283, 1285 (Fed. Cir. 2012), Judge Smith of the Federal Court of Claims initially entered a judgment in favor of four plaintiffs – Shell Oil, Arco, Texaco and Union Oil – but then recused himself and vacated the judgments as to Union Oil and Texaco (but not Shell Oil and Arco) after realizing that his wife had a financial interest in those two companies. The Federal Circuit held that Judge Smith should have recused himself and vacated the judgments as to all four plaintiffs, based on the same principle set forth above:

> [G]iven the identity of issues involved, the parties do not dispute that a decision in this case will control the outcome in the severed case involving Texaco and Union Oil . . . . The government argues that, if judge's opinions [*sic.*] with respect to Shell Oil and Arco are allowed to stand, the government would be precluded from challenging the court's determinations under the doctrine of collateral estoppel because the issues would have already been decided adversely to the government. We agree. Because the Oil Companies' avgas contracts contain substantially similar language and the facts relating to dumping waste at the McColl site are nearly identical as to all four companies, the judgment here could have a preclusive or prejudicial effect in the severed case.

Id. at 1293 (internal citation omitted). Likewise here, there can be no dispute that a ruling involving Member Emanuel in any *D.R. Horton* case may "control the outcome" in the cases from which he is recused as explained in §I. Therefore, recusal from all these cases is required.

Finally, in *Matter of Hatcher*, 150 F.3d 631, 632 (7th Cir. 1998), Judge Kocoras presided over three related gang trials. Defendant Hatcher was a named co-conspirator in two of those cases and the defendant in a third (the *Hatcher* case), while Defendant Hoover was a named co-conspirator in two cases (one being the *Hatcher* case) and the defendant in a third (the *Hoover* case). *Id*. Hatcher moved to have Judge Kocoras recused from the *Hatcher* case because the

judge's son worked for the prosecution in the *Hoover* case. *Id*. at 633. The Seventh Circuit found that "the circumstances of this case required [the judge] to recuse himself under §455(a) because of the significant risk of an appearance of impropriety." *Id*. The appellate court recognized that the *Hatcher* and *Hoover* "cases are formally separate proceedings" and that it was not holding that "any connection, however tenuous, between two cases would require recusal." *Id*. at 638. Nevertheless, because of the relationship between the cases, the Seventh Circuit concluded that Court found that Judge Kocoras' "impartiality might reasonably be questioned" as a result of the relationships between those cases, such that recusal was required. *Id*. at 637. Similarly here, recusal is required because a ruling in any *D.R. Horton* case could have a controlling and fully dispositive effect in other *D.R. Horton* cases involving Member Emanuel's former clients and/or his former firm. The principle is well established: if a public official is recused from participating in Case X, that official must also be recused from every case that may have a controlling effect on Case X, even if those cases are separate.

Application of that established principle to the Board's position and strategy in cases raising the *D.R. Horton* issues is straightforward. On October 2, 2017, the Supreme Court will hear arguments in three consolidated cases, *NLRB v. Murphy Oil USA, Inc.*, 361 NLRB No. 72, 10-CA-038804; *Epic Systems Corp. v. Lewis*, Case No. 15-2997; and *Ernst & Young LLP v. Morris*, Case No. 13-16599. The employers in those cases (and amicus DRI, represented by the Littler firm) are asking the Supreme Court to overturn the Board's decisions in its *D.R. Horton* line of cases.

The Board was initially represented by the Office of Solicitor General, which filed a Petition for Writ of Certiorari on behalf of the Board and the United States in *Murphy Oil*. However, in June 2017, the Acting Solicitor General filed an amicus brief in support of the

respondent employer in *Murphy Oil*, leaving the Board to represent itself in the Supreme Court proceeding. The Board filed its Respondent's Brief in *Murphy Oil* on August 9, 2017. General Counsel Richard Griffin is scheduled to argue all three consolidated cases on October 2, 2017. Any decision by the Supreme Court to overturn *D.R. Horton* will necessarily have a direct, controlling effect on the pending *D.R. Horton* cases in which Member Emanuel's former clients and former firm are parties, as explained above.

If Member Emanuel does not recuse himself from all deliberations concerning the Board's position or strategy with respect to *D.R. Horton* and the five *D.R. Horton* cases pending in the Supreme Court – the three consolidated cases being argued plus the two additional cases being held – his participation in those deliberations could materially influence the Board's and the General Counsel's position in a manner that would make it more likely that the Court would overturn *D.R. Horton,* thereby directly benefiting his former clients and his former law firm's current clients in many pending *D.R. Horton* cases. Further, because the Board's rules permit a Member to participate in deliberations concerning pending case strategy without having to make public disclosure of that participation, formal recusal is the only way to ensure Member Emanuel's non-participation.

III. Member Emanuel May Not Participate in Any *D.R. Horton* Case Because It Would Create the Appearance that He Is Violating the Ethical Standards.

Member Emanuel's extensive former advocacy challenging the validity of the Board's *D.R. Horton* decision, combined with his continued financial ties to Littler Mendelson, which continues to represent employers and employer associations in *D.R. Horton* cases, require that Member Emanuel recuse himself from all *D.R. Horton*-related cases.

Member Emanuel was an equity partner at Littler Mendelson PC from July 2004 until his appointment to the Board. Until recently, Member Emanuel was counsel of record for the

respondent employer in *Mastec, Inc.*, 12-CA-153478, *Quality Dining Inc. and Grayling Corporation ("Quality Dining")*, 04-CA-175450; and *Handy Technologies, Inc*., No. 01-CA-158125 and 158144, all three of which are *D.R. Horton* cases currently pending before the Board. In addition to those cases, Littler Mendelson is also counsel for the respondent employers in *Cornerstone Health Care Group*, 16-CA-154503 (briefed and awaiting a decision from the Board), and *Walnut Creek Associates 2, Inc., d/b/a/ Walnut Creek Honda*, 32-CA-176353 (awaiting a decision from the Board), both of which are *D.R. Horton* cases as well. In both cases, Littler Mendelson represented a party to the Board proceedings while Member Emanuel was a law firm partner. Member Emanuel's law firm is also counsel for respondent employer in this case, *Raymour's Furniture Company, Inc.*, Case No. 02-CA-136163, which is currently stayed pending a final resolution of the *D.R. Horton* issue in *Patterson v. Raymours Furniture Co.*, 659 Fed. Appx. 40 (2d Cir. 2016), Petition for Certiorari pending No. 16-388. The Board in this case previously agreed to be bound by the outcome of the Second Circuit case, which is now before the Supreme Court and is being held pending a decision in the three consolidated *D.R. Horton* cases. In other words, the result in the pending Supreme Court cases will directly and immediately determine the result in the Second Circuit case *and* the Board case against Littler Mendelson's client, Raymours Furniture Co.

Littler Mendelson also represents DRI, described as an organization that represents and works on behalf of the civil defense bar, as an amicus in all three consolidated *D.R. Horton* cases pending before the Supreme Court. Littler Mendelson began its representation of DRI as an amicus in those cases while Member Emanuel was still a partner at that firm.

The Littler Mendelson law firm, which has drafted, enforced, and defended the legality of many mandatory arbitration agreements with collective action prohibitions before the Board,

before state agencies and courts, and in the federal courts, including the Supreme Court, has a significant stake in the outcome of those and all pending cases, which will establish controlling legal principles directly affecting the employers' liability in all current and future *D.R. Horton* cases.

Member Emanuel earned a yearly salary of $417,770 from Littler Mendelson. William Emanuel, *Executive Branch Personnel Public Financial Disclosure* Report (OGE Form 279e). He is scheduled to be paid from his capital account with the firm over the course of three years, extending into his tenure on the Board. *Id.* Member Emanuel will also continue to participate in the Littler Mendelson 401(k) plan. *Id.*

Member Emanuel's public statements and positions concerning *D.R. Horton* make it evident that his position as to the legal correctness of *D.R. Horton* is pre-determined, and that he cannot adequately fulfill his duty as an impartial decision maker approaching cases on the subject. Member Emanuel's involvement with these issues goes far beyond "[m]ere familiarity with the facts of the case" or a "position…on a policy issue related to the dispute." *See, e.g.*, *Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482, 493 (1976). Instead, he and his law firm have challenged the validity of the Board's *D.R. Horton* line of decisions in numerous courts, filed a series of amicus briefs in many circuit courts and the U.S. Supreme Court, and drafted arbitration agreements whose legality is now at issue for dozens of clients, and whose legal validity will be directly affected by the Supreme Court and Board decisions.

A reasonable person with knowledge of the facts would conclude that Member Emanuel's impartiality is compromised in all matters related to *D.R. Horton* such that his participation in those matters would violate 5 C.F.R. §2635.101(b). His former colleagues and

clients have a direct interest in the outcome of all *D.R. Horton* cases. Member Emanuel himself has extensively and aggressively advocated for the reversal of the Board's *D.R. Horton* decision throughout the past several years. For these reasons, Member Emanuel should be required to recuse himself from all *D.R. Horton* cases.

CONCLUSION

Based on the foregoing grounds, Charging Parties hereby request that Member Emanuel recuse himself from participating in any National Labor Relations Board discussions or decisions related to *D.R. Horton*, as set forth above.

Dated: September 26, 2017
New York, New York

Respectfully submitted,
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